No. 6116

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RALPH WIEN,
Appellant,

vs.

ALASKAN AIRWAYS INC. (a corporation),
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

HARRY E. PRATT,
LOUIS K. PRATT,
Fairbanks, Alaska,
HERMAN WEINBERGER,
Merchants Exchange Building, San Francisco, California,
Attorneys for Appellant and Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

No. 6116

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RALPH WIEN,
Appellant,

vs.

ALASKAN AIRWAYS INC. (a corporation),
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorables Frank H. Rudkin, Frank S. Dietrich, and Curtis D. Wilbur, Circuit Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

I.

INTRODUCTION.

We respectfully ask the Court for a rehearing of this cause and a reconsideration of that part of its decision which declares that under the provisions of *Sections 657* and *660* of the Compiled Laws of Alaska the contract in question is only voidable and can be enforced in favor of the corporation by the Courts of the Territory.

The part of the opinion to which we have reference is as follows:

"Without unduly straining the text, it is thought the two (Sections 657 and 660) may be harmonized and each given effect by assuming that Section 657 was intended to apply to a case where, as here, the corporation, though in default at the time the contract was made, later complies with the law; and Section 660, to a case where the corporation wholly fails to comply."

II.

WHEN A CONTRACT IS MADE IN THE TERRITORY WITH A RESIDENT THEREOF PRIOR TO A COMPLIANCE WITH THE PROVISIONS OF THE CHAPTER, SECTION 660 APPLIES AND THE CONTRACT CANNOT BE ENFORCED BY THE COURTS IN FAVOR OF THE CORPORATION.

We are convinced that the Court has overlooked not only the principal intent and purpose of *Section 660,* but also a distinguishing fact in existence in this case. The admitted fact is that the contract was made in Alaska with a resident thereof prior to a compliance by the foreign corporation with *any* of the provisions of Chapter 23.

With respect to *Section 657,* the Court apparently holds that not only may the other party to the contract enforce it or cancel it by formal rescission, but also that the corporation may enforce it provided it qualifies before commencing suit. If *Section 657* stood alone, or was the only provision on the subject, there might be some basis for this interpretation. However, as the Court admits, both sections must be construed together and both given the full effect according to the intent therein expressed. We cannot

escape the conclusion that the Court's decision wholly disregards the principal purpose of *Section 660.*

We maintain that it is most obvious that *Section 660* was intended to supplement *Section 657.* The outstanding feature of *Section 660* is its treatment of contracts made *"with residents of the Territory of Alaska, made in the Territory."* No such clause appears in *Section 657.* Therefore, *Section 660* was meant as a qualification of *Section 657.*

That qualification consists of the statutory intent as expressed in *Section 660* to protect *residents of the Territory* from the enforcement against them of contracts made with them in the Territory by foreign corporations which attempt to make those contracts without first qualifying to do business. The imposition of this condition has been so plainly recognized by not only the Courts of Alaska, but also this Court, that it is quite impossible to disregard it when all of the requisite facts exist calling for its application.

In our opening brief we called attention to certain authorities which the Court in the decision at bar disregarded for the avowed reason that the question before us here is not, in those cases, "directly involved or definitely discussed." While this may be true to a limited extent, nevertheless can it be safely said that if this exact question had been before the Court in those cases, the Court would have held that where a contract is made in the Territory, with a resident thereof, it can be enforced in favor of the

corporation so long as the corporation had qualified subsequent to the making of the contract and at any time up to the commencement of suit? Let us here take brief notice of what those cases declare with respect to the construction of *Section 660.*

Burr v. House, 3 Alaska 641, declares that compliance with the statute *is a condition precedent* to the right of a foreign corporation to do business within the Territory.

In re Craig Lumber Co., 6 Alaska 356, clearly recognizes the effect of the qualification contained in *Section 660* by announcing that the contract is void and the Court is enjoined not to enforce it in favor of the corporation "only where a foreign corporation which has failed to comply with the statutory requirements *deals with a citizen of Alaska.*" (Italics ours.)

Alaska-Siberian Navigation Co. v Polet, 7 Alaska 374, also observes the condition by holding that the failure of the foreign corporation to qualify "renders contracts *made with residents of the Territory, in the Territory,* void, and no Court of the Territory shall enforce the same in favor of the corporation." (Italics ours.)

And, likewise, this Court itself has heretofore fully recognized the force and effect of this particular provision of *Section 660* for in *Cobb v. McDonald-Weist Logging Co.,* 278 Fed. 165, it was expressly announced that *Section 660* has no application *where neither of the parties to the contract was a citizen of Alaska.*

And finally, in *Ross-Higgins Co. v. Protzman, et al.*, 278 Fed. 699, this Court unequivocally declared the force and effect of this particular provision when it said:

> "To adjudge a contract wholly void under Section 660 as to the corporation, *it must clearly appear that the contract was made with a citizen of the District.*" (Italics ours.)

It is not conceivable that this Court, in the last cited case, would have so definitely expressed its understanding and interpretation of *Section 660* if there could be any basis whatever for deciding that the contract can be enforced in favor of the corporation just so long as qualification takes place before commencement of suit.

The decision at bar wholly sets at naught the protection afforded to residents of the Territory by *Section 660.* Under this decision it will hereafter be possible for all foreign corporations doing business in Alaska to completely defy the laws of the Territory, make contracts there with residents thereof, and refrain from qualifying so long as no necessity ever exists for going into Court to enforce those contracts. Then, when such necessity arises, all that it is necessary for the corporation to do is to simply qualify before commencing suit. In other words, although it is the intent of the statute, *with respect to residents of the Territory,* to penalize the foreign corporation for making a contract when unqualified, rendering such contract absolutely void, nevertheless this decision removes that penalty entirely and permits a sub-

sequent qualification and enforcement of the contract against the resident.

We here call attention to the fact that *in 1923* the Territorial Legislature, without changing *Section 657* in any respect, amended *Section 660* by changing the clause *"with citizens of the District"* to read *"made by such corporation or company with residents of the Territory of Alaska, made in the Territory."* It is obvious that in adopting this amendment the Legislature had in mind mainly the protective feature of *Section 660* and intended to enlarge that protection to residents of the Territory so far as contracts made in the Territory are concerned, specifically designating what particular contracts made with that particular class of individuals shall be, not voidable, but void, as to the corporation and unenforcible by the Courts of the Territory in its favor. We do not believe that it could possibly be more clearly stated that when an unqualified foreign corporation makes a contract in Alaska with a resident thereof, the contract cannot, under any circumstances, be enforced in favor of the corporation.

In our opening brief herein we neither mentioned nor discussed the *Ames v. Kruzner* case. We felt, and still feel, convinced that that case has no force as an authority upon the question involved here. From an analysis of that decision and the decisions in the above mentioned Alaska cases, and the cases before this Court, we could not escape the conclusion that so far as the construction and interpretation of these statutes are concerned, it was entitled to no consideration whatever. The decision is in 1 Alaska,

and is the first reported decision of any Court of the Territory involving the provisions of Chapter 23 of the Compiled Laws. Although the questions therein considered have subsequently come before the Alaska Courts, and also before this Court, never once has the *Ames v. Kruzner* case been taken cognizance of, or even mentioned. We still feel certain that while it may be true the precise question involved here was not up for decision in those cases, nevertheless the Alaska Courts, and particularly this Court, did go to the extent of definitely announcing a construction and interpretation of *Section 660.* That construction and interpretation are wholly inconsistent with the rule announced in *Ames v. Kruzner,* and it is for this very reason that we originally concluded, and now maintain, that *Ames v. Kruzner* has been practically overruled so far as the construction of *Section 660* is concerned.

III.

THE DEFENDANT HERE HAS A COMPLETE DEFENSE TO THE ENFORCEMENT OF THE CONTRACT AGAINST HIM BY INVOKING THE PROVISIONS OF SECTION 660.

We respectfully urge the Court to give further consideration to the decision in *M. S. Cohn Gravel Co. v. Southern Surety Co.* (Okla.), 264 Pac. 206. That case is a direct authority upon the question involved here, because the statute under consideration there is almost identically the same as *Section 660.* Both the Oklahoma and the Alaska statutes are outgrowths of the same Congressional Act, which was in

effect in Oklahoma when it was a Territory, just as *Section 660* is now in effect in the Alaska Territory.

The Oklahoma Court holds that while the corporation may sue, provided that it has domesticated prior to commencing suit, nevertheless, under the statute, the defendant, the other party to the contract, provided he is a citizen of the State, has a perfect defense to that suit by invoking the statute. In this connection the Court says:

> "Under the latter section the corporation must domesticate before it can bring its suit, *and even then the citizen has a perfect defense against the enforcement of the contract by invoking the statute.* This construction fulfills the purpose of the statute and is in accord with many respectable authorities." (Italics ours.)

It will be noted that in the *Cohn* case, the foreign corporation was allowed to enforce the contract for the sole reason that the other party to the contract had stood upon it and sought redress thereunder, thus waiving the protection given him by the statute and estopping himself from invoking the same.

The holding in the *Cohn* case cannot be reconciled with *Ames v. Kruzner.* It is, however, perfectly consistent and in harmony with *Burr v. House, In re Craig Lumber Co., Alaska-Siberian Navigation Co. v. Polet, Cobb v. McDonald Weist Logging Co.,* and *Ross-Higgins v. Protzman,* (supra), on the precise question that is involved here, namely, the correct interpretation of the statutory provisions contained in *Section 660.*

IV.

WHETHER THE CONTRACT BE CONSIDERED VOID OR VOIDABLE, IT IS, UNDER THE FACTS BEFORE THE COURT, UNENFORCIBLE BY THE CORPORATION.

In the consideration of this question, too much importance can be attached to whether or not the contract involved is void or voidable. Confusion exists in some of the authorities by a too meticulous effort on the part of the Courts to define and distinguish the terms "void" and "voidable."

Where, as here, the true question is whether the contract is enforcible in favor of the corporation by any of the Courts of the Territory, it is only a matter of incidental interest as to whether or not the contract be regarded as void or voidable.

We call attention to the recent case of *Burroughs v. Southern Colonization Co.* (Ind.), 165 N. E. 763, where the Appellate Court, in deciding against the foreign corporation, held that the contract which it was seeking to enforce was void. The corporation applied for a rehearing upon the ground that, in holding the contract void, the Court was practically overruling certain of its prior decisions. In disposing of the petition for a rehearing, the Court rendered the following opinion:

> "On petition for rehearing, appellee challenges our holding that the contract in suit, because of appellee's failure to comply with the laws of Indiana with reference to foreign corporations, is void, and contends that U. S. Construction Co. v. Hamilton Nat. Bank of Ft. Wayne, Ind., 73 Ind. App. 149, 126 N. E. 866, should be overruled. After further consideration of this ques-

tion, we conclude that it was wholly unnecessary, in order to this decision, for us to determine as to whether the contract was void. Where, as here, a foreign corporation has failed to comply with the laws of the state that qualify it to do business in the state, it is sufficient for us to say in the substantial language of the statute, Section 4918, Burns' 1926, that it may maintain no suit either at law or in equity upon any claim, legal or equitable, whether arising out of contract or tort, in any court of this state.

"We therefore withdraw any holding as to the contract being void, and, with this modification, the petition for rehearing is denied."

V.

CONCLUSION.

The main question involved here is the correct construction of *Section 660.* We respectfully urge that the true interpretation is that where the contract is made in the Territory, with a resident thereof, at a time when the foreign corporation has failed to qualify, no Court of the Territory has the pawer to enforce that contract in favor of the corporation if the other party to the contract invokes the statute as a defense. This is the precise situation here.

When it is said that the Courts may enforce such a contract in favor of the corporation if it appears that it has domesticated prior to commencing suit, an interpretation is placed upon the statutory provisions which is not found in the expressed terms and

which completely nullifies the plain intent of *Section 660.*

There is no undue harshness in *Section 660* as it is written. It is the policy adopted in almost all of the states, and it has been repeatedly declared by the Courts that where the foreign corporation deliberately fails to comply with the local law, the Courts will not aid it in its claims or demands against local citizens or residents, regardless of how the advantages between the respective parties lie. If it should incidentally be that the citizen or resident has received benefits under such a contract, neverthelss it is nothing more or less than one of the penalties imposed against the foreign corporation for its violation of the law, and from this point of view the Courts enforce these laws when the legislative policy clearly demands it. There can be no doubt that this policy is universally adopted in the interests and for the protection of local citizens and residents, and not in the interests and for the protection of foreign corporations. The decision in the case at bar deprives residents of Alaska of a definite protection given them by a specific statutory provision, and from this point of view the question involved here is one of wide public interest.

We respectfully ask that appellant's petition for a rehearing be granted.

Dated, August 26, 1930.

HARRY E. PRATT,
LOUIS K. PRATT,
HERMAN WEINBERGER,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, August 26, 1930.

HERMAN WEINBERGER,
Of Counsel for Appellant and Petitioner.